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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 207 52559 Office: California Service Center Date: JAN 16 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer systems development company. It seeks to employ the beneficiary permanently in the United States as a user support analyst. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing.

On appeal, counsel argues that temporary periods of unprofitablilty do not demonstrate that the petitioner is unable to pay the proffered salary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification

was accepted for processing on December 10, 1998. The proffered salary as stated on the labor certification is $72,000 annually.

With the petition, counsel submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return showing taxable income of (-) $617,036.

On October 9, 2002, the director issued a Request for Evidence in this matter. The director noted that the petitioner's tax return does not appear to show the ability to pay the proffered wage. The director requested evidence regarding the beneficiary's education and training, evidence of the petitioner's ability to pay the proffered salary, and documentation regarding the substitution of this worker for another.

In response, the petitioner submitted 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns. The return for 1999 reflected taxable income of $566,692. The return for 2000 reflected taxable income of (-) $617,036, and the return for 2001 reflected a taxable income of (-) $122,428. In addition, the petitioner submitted a photocopied Form W-2 Wage and Tax Statement indicating that the beneficiary earned $14,452.76 during 2000, a photocopied Form W-2 Wage and Tax Statement indicating that the beneficiary earned $73,447.67 during 2001, and pay stubs for 2002. Although the petitioner indicated that a 1998 return was submitted, it is not in the record.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel stated, in pertinent part, that:

> Temporary periods of unprofitable status in themselves do not bar a petitioner [from] showing [the] ability to pay. The Service must give appropriate consideration to alternative forms of financial evidence, such as cash reserves, which have allowed the actual payment of the salary between periods of profitability.

Counsel did not submit any additional evidence on appeal.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049,

1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983).

On appeal, counsel argues that CIS must give consideration to alternative evidence such as cash reserves to show the ability to pay the wage. The record contains no bank account statements or other records indicating that the petitioner has the funds required to provide the beneficiary with the stated salary. The petitioner submitted only page 1 of Form 1120 for the years 1999, 2000, and 2001. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Although the beneficiary's Form W-2 for 2001 shows that the petitioner paid him $73,447.67, an amount above the proffered wage, analysis of the Form W-2 for 2000 and the pay stubs for 2002 indicates payments to the beneficiary which would result in an annual wage below the proffered wage. The record contains no explanation of these seeming discrepancies. It is noted that Department of Labor regulations at 20 C.F.R. § 656.20(c)(3) state that the wage offered must not be based on "commissions, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

The record contains no evidence that the petitioner has any cash reserves with which to pay salaries, nor has counsel submitted any evidence indicating that the petitioner's prospects for a resumption of successful business operations are well established. Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of filing of the petition and continuing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.